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No. 99-788

IN THE

Supreme Court of the United States

SPOKANE VALLEY FIRE PROTECTION DISTRICT NO. 1, a public employer and political subdivision of the State of Washington,

Cross-Petitioner,

v.

GARY COLLINS, *et al.*,

Cross-Respondents.

On Cross-Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Ninth Circuit erred in holding that a public employer covered by the overtime and compensatory time provisions of the Fair Labor Standards Act may compel public employees to use their accrued compensatory time absent an express agreement authorizing such compulsion?

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The proper dispositions of the primary Petition (No. 99-592) and the Cross-Petition (No. 99-788) are to HOLD the Petition in light of *Christensen* v. *Harris County*, No. 98-1167, *cert. granted*, Oct. 12, 1999, and to DENY the Cross-Petition. The Petition raises the identical question being addressed in *Christensen*, the Ninth Circuit expressly relied upon the decision being reviewed in *Christensen*, and almost any disposition of *Christensen* other than an unqualified affirmance should lead to a GVR of the primary Petition in this case. The Cross-Petition, however, presents a quite different question not posed by the facts of this case, never addressed by the district court or the Ninth Circuit, and not the subject of any split among the circuits. It thus should be denied.

JURISDICTION

Because the Cross-Petitioner prevailed below, both on the general result and on the particular question of whether its actions violated the FLSA, it would seem to lack standing to petition this Court for review, notwithstanding the literal language of 28 U.S.C. § 1254(1). This is particularly so given that Cross-Petitioner's alternative theory for affirmance would not alter the judgment below in any way. (Cross-Respondents note that the Cross-Petition did *not* seek review of the exhaustion issue on which the Ninth Circuit ruled against the Fire District, hence standing may not be based upon any potential effect review of that issue might have.)

STATEMENT OF THE CASE

The facts of this case are fully set out in the Statement of the Case in the primary Petition (No. 99-592). The description of the case set out in the Cross-Petition and the incorporated Response to the Petition, however, is incorrect or misleading in two respects.

First, throughout its Cross-Petition the Fire District claims that this case involves an existing "agreement regarding the preservation and use of compensatory time" and that the Fire District "acted in accordance with that agreement." Cross-Pet. at 3; *see also id.* at 4 (parties "entered into a collective bargaining agreement that governs the preservation and use of compensatory time"); *id.* (order to schedule comp time was "pursuant to the negotiated agreement between the parties"); *id.* at 7 (order to use time "was entirely consistent with the collective bargaining agreement and the understanding and intent of the parties when negotiating the agreement"); *id.* at 8 ("the Fire District acted in accordance with the agreement and the understanding of the parties"). These claims are incorrect. The collective bargaining agreement ("CBA") in this case

does not provide the Fire District a right to compel the use of accrued comp time as it approaches the 144-hour limit. Indeed, the provisions of the CBA demonstrate that the parties contemplated accrual of comp time above 144 hours, and provided an express provision for such a contingency.

The relevant provisions of the CBA in this case are as follows:

> **Section 9.** Shift employees who are required to perform tasks, attend meetings or perform other duties outside their regular shift hours shall receive one and one half hours of comp time off for each hour worked. *If such employees have a total accumulation of more than 144 net hours of comp time at the end of any month*, that is comp time for 96 hours called back, *they will be paid their hourly wage rate for each comp hour in excess of 144 hours on the first pay day of the following month.*
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> * * *
>
> **Section 11.** Requesting of Comp Time Hours: Employees shall request in writing from the District, at least 64 hours in advance, the number of hours and the date that they want comp time off. The District may deny the request if it deems it necessary. If, on the third request to take comp time hours, the District should deny the request, the District shall pay the employee his/her hour [sic] hourly wage rate for the comp hours requested, unless the denial is because more than two employees have asked to be off at the same time. If a request is made less than 64 hours in advance and denied, it will not count as a denial of a request.

(Emphasis added.) As can be seen from the language of the CBA, it in no way confers upon the Fire District any right to compel the use of comp time in order to keep hours below the 144-hour limit. Indeed, the language directly addresses the contingency that accrued hours would exceed 144, thus showing that the parties contemplated such a situation. And

where the contemplated accumulation did exceed 144 hours, the CBA also provides the sole appropriate response: the employees are to be paid in cash for the excess comp time on the first day of the following month. In the face of this language, it is incorrect to claim that the parties *agreed* that the Fire District could compel the use of comp time to keep accrued comp time below the 144-hour limit. At best the compelled use of comp time is not addressed at all by the agreement and at worst it is implicitly rejected by the structure and interrelationship of the express provisions.

Second, throughout the Fire District's Response to the Petition, which it incorporates by reference into the Cross-Petition, the Fire District makes the slightly different claim that "it was understood that employees would not accrue compensatory time up to the 144-hour cap." Response at 2; *see also id.* at 3 ("The parties' undisputed intent was never that employees could bank their compensatory time up to the cap and receive cash payments on a regular basis at one and one-half times their regular rate of pay."); *id.* (order to use comp time was "consistent with the intent and meaning of the parties' agreement") *id.* n. 2 ("the Firefighters acted contrary to that agreement and the parties' intent"). These claims likewise misstate the plain terms of the CBA and, to the extent they suggest some agreement beyond the terms of the CBA, are merely wishful thinking.

As already noted, the language of the CBA amply demonstrates that the parties not only "understood" that comp time might accumulate in excess of 144 hours, they specifically provided for such a contingency. The language of the CBA is certainly the best evidence of what the parties both "understood" and intended. The Fire District's position thus rests upon a supposed "understanding" that was inconsistent with the express terms of the CBA, was never memorialized in writing, and was certainly not found by the courts below. The Firefighters certainly do not share the Fire District's supposed understanding of what they agreed to concerning comp time.

In the courts below, the Firefighters took the position that the compelled use issue was an unprovided-for situation not expressly covered by any agreement and thus subject solely to the default requirements of the FLSA.[1]

REASONS FOR DENYING THE CROSS-PETITION

The Cross-Petition should be denied because it presents a question not posed by the facts of this case, not addressed by either the district court or the Ninth Circuit below, and not the subject of a split among the circuits. Rather, this case was decided on grounds antecedent to the question raised in the Cross-Petition and neither court below had reason to make the factual or legal findings necessary for this Court adequately to address the question presented in the Cross-Petition.

First, once the factual errors in the Cross-Petition are corrected, this case does not raise the question presented in the Cross-Petition because the Fire District did *not* act "in accordance with [the CBA] when compelling its employees to use compensatory time." The CBA either fails to address such compulsion at all or forbids it by implication. Either way, the CBA does not constitute an agreement that would overcome a default presumption favoring employee control over the use of accrued comp time.

Second, even if it were possible to find a parole agreement allowing compelled use of comp time, no court has yet done so and it is most certainly not the role of this Court to

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[1] *See* Appellants' Reply Brief in the Ninth Circuit, at 5-6 ("A cursory reading of the parties['] collective bargaining agreement reveals that there is no provision that authorizes the Fire District to order an employee to involuntarily use accrued compensatory time off. CR 30 pages 63-69. More to the point, the affidavits submitted by Chiefs Lobdell and Rider on summary judgment do not allege or even infer that the parties to the collective bargaining agreement[] *arrived at an understanding and agreement* whereby the Fire District, by order, could require an employee involuntarily to use accrued compensatory time off. CR 35 and 36.") (emphasis in original).

make such a finding in the first instance. Such a finding is for the courts below, neither of which reached the issue. Rather, both courts found for the Fire District by treating the compelled use of comp time as an unprovided-for situation and finding a default rule favoring the employer. It was thus unnecessary to reach the Fire District's claim that it was affirmatively authorized by agreement to compel the use of comp time. If anything, the district court suggested that the agreement forbade such compulsion and was thus being generous in treating this as merely an unprovided-for situation. *See* Pet. App. B11 ("The District may have breached the collective bargaining agreement, but it did not violate the FLSA.") And in the Ninth Circuit, the court recognized that the CBA "does not specifically address the issue of whether the Fire District may compel Appellants to use comp time." Pet. App. A11 n. 4. Although the Ninth Circuit made a reference to some evidence concerning the alleged intent and assumptions relating to the agreement, it expressly declined to rule on such matters. *Id.*

Third, Cross-Petitioner identifies no split on the issue of whether an affirmative agreement allowing for compelled use of comp time violates the FLSA. The permissible scope of a comp time agreement is an issue subsequent to what the default rule is in the absence of an agreement. Assuming the default rule prohibits compelled use of comp time absent an agreement, the courts below might then address the Fire District's affirmative defense that their compulsion was authorized by agreement. But that defense will involve a plethora of additional issues that are yet to be developed in this case or elsewhere. For example, a court would have to consider what type of agreement – written or oral – is sufficient to overcome the default rule. How specific must the agreement be? Are the requirements different in the context of collectively bargained agreements versus individually obtained agreements? Does a bargaining representative have the right to bargain away the right to control earned comp time? How much con-

trol over comp time may be ceded before it ceases to be compensation at all and hence inconsistent with 29 U.S.C. § 207(*o*)?

These questions will no doubt be influenced by the Court's eventual decision in *Christensen* regarding the default rule for employer control, or lack thereof, over the use of accrued comp time absent an agreement governing such control. But the further questions will require considerable percolation before they are ready for consideration by this Court. They are certainly not ready for consideration in this case, where they have never been addressed at all.

Fourth, on the off-chance that the Court has called for this response due to some newly discovered difficulty in resolving *Christensen* on the merits, this case would still present a favorable vehicle for reaching the default-rule issue. The question on which the Court should grant certiorari under such circumstances is the question presented in the initial Petition (No. 99-592), which the Fire District does not oppose, or the alternatively worded question in this Brief in Opposition to the Cross-Petition. This case provides a favorable vehicle for either of those questions, and would allow the Court to at least consider the issues in the context of a CBA and provide some incidental guidance for the various subsequent questions noted above.

CONCLUSION

For the foregoing reasons, the Cross-Petition (No. 99-788) should be denied and the primary Petition (No. 99-592) should be held in light of *Christensen* v. *Harris County*, No. 98-1167.

Respectfully submitted,

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